REPORT

of the

Massachusetts Judges Conference
subcommittee on

ORGANIZATION AND ADMINISTRATION OF THE COURTS

August, 1991

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Chapter One

INTRODUCTION

WHO ARE WE?

The Massachusetts Judges Conference is a statewide organization whose members are exclusively Massachusetts judges. Membership is voluntary, and is open to all Massachusetts judges. Not all Massachusetts judges are members of the Massachusetts Judges Conference, but a majority are. The purpose of the Massachusetts Judges Conference is to promote the advancement of the judicial system and the judiciary of the Commonwealth.

The Subcommittee on "Organization and Administration of the Courts" of the Massachusetts Judges Conference is one of several subcommittees of the "Committee on the Future of the Courts" of the Massachusetts Judges Conference. [1]

WHAT IS OUR PERSPECTIVE?

Each judge serving on this subcommittee shares a deep respect for the Massachusetts judicial system, and a desire to make it the best system it can be. We serve as judges because we are proud to. We believe that the Massachusetts judicial system is a good one; but we care deeply about valid criticisms which have been raised concerning it. We want to be part of any process that seeks to improve it. Judges have sounded the alarm for some time that there is a crisis in our courts which has recently gained widespread attention, and we believe that judges have a unique perspective on what the critical needs of the courts are.

The time is ripe for some improvements. We welcome discussion and debate about how to improve our court system. As judges who serve in the Commonwealth's various trial courts on a daily basis, we are convinced that certain changes are warranted. We hope that all those with an interest in improving the administration of justice in the Commonwealth will contribute to this dynamic process by putting forward proposals or observations of their own. **However, as public discussion unfolds, we echo the words of the Boston Bar Association in its report: "Unless adequate funding is provided to the courts, nothing, much less these recommendations, will save the system from collapse."**

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[1] Our subcommittee consists of the following member judges: Christina Harms, Probate Court (circuit) (Chair); James Dolan, Dorchester District Court (co- Chair); Margot Botsford, Superior Court; Thomas Brownell, Plymouth District Court; Gordon L. Doerfer, Superior Court; Barbara Dortch, Superior Court; Herbert Hershfang, Boston Municipal Court; Robert Kumor, Jr., Holyoke District Court; Paul LoConto, Spencer District Court; Paul McGill, Roxbury District Court; Thomas Merrigan, Orange District Court; Dom Russo, Milford District Court; Norman Weinberg (retired), Brookline District Court; Margaret Zaleski, District Court (circuit); Elliot Zide, Fitchburg District Court; Hiller Zobel, Superior Court.

We are proud of the diversity our subcommittee represents: we are young and old(er); we are new appointees to the bench and seasoned veterans of the bench; we are black and white; we are male and female; we are Republican gubernatorial appointees and Democrat gubernatorial appointees; we sit on the District, Superior, Probate, and Boston Municipal courts (all of the trial courts but the three smallest: Land, Juvenile, and Housing); we come from all geographic portions (eastern, central, and western) of the Commonwealth.

This subcommittee report has not yet been considered by the entire Conference.

WHAT ARE THE PROBLEMS?

The MBA/Harbridge House report contains a number of excellent observations about problems in the court system. It sheds some valuable light on why we have a crisis in the court system. We differ with and cannot support three (3) of the specific solutions that the MBA/Harbridge House report proposes (see Chapters 3 and 4 and 5 of this report), but we nevertheless endorse as accurate MBA/Harbridge House's overall assessment of the problems that exist.

The BBA Report also contains valuable observations, and likewise accurately identifies the current crises. There are no proposed solutions in the BBA report (speaking broadly, without concurrence on every detail) with which we disagree.

In our view as judges, the problems [2] requiring solution are:

- **Lines of authority** at all levels (judges, clerks, court officers, clerical staff, etc.) are unclear, complex, diffuse, insufficient, or simply not exercised for lack of firm managers. There is almost no accountability in the court system. To the question "Who's in charge here?" the answer is "No one."

- **The judicial budget** is controlled by the Legislature in too much detail and is inflexible. Line item budgeting by the Legislature defeats good management and should no longer occur. A large percentage of the "court" budget is in reality the budget of a separate non-court entity (the Committee for Public Counsel Services) and needs to be separated and managed directly by CPCS.

- **Judges and non-judicial support staff are not allocated efficiently, flexibly and where they are needed.** Some court sessions are frequently overworked beyond the breaking point. Some courts have insufficient business to keep them busy.

- **Antiquated information systems** are still widespread. Very few computer systems, and too many paper systems, are used.

- **Caseflow management techniques** need further improvement. Continuances are still too frequent in many courts. Alternative dispute resolution (ADR) has not been sufficiently employed.

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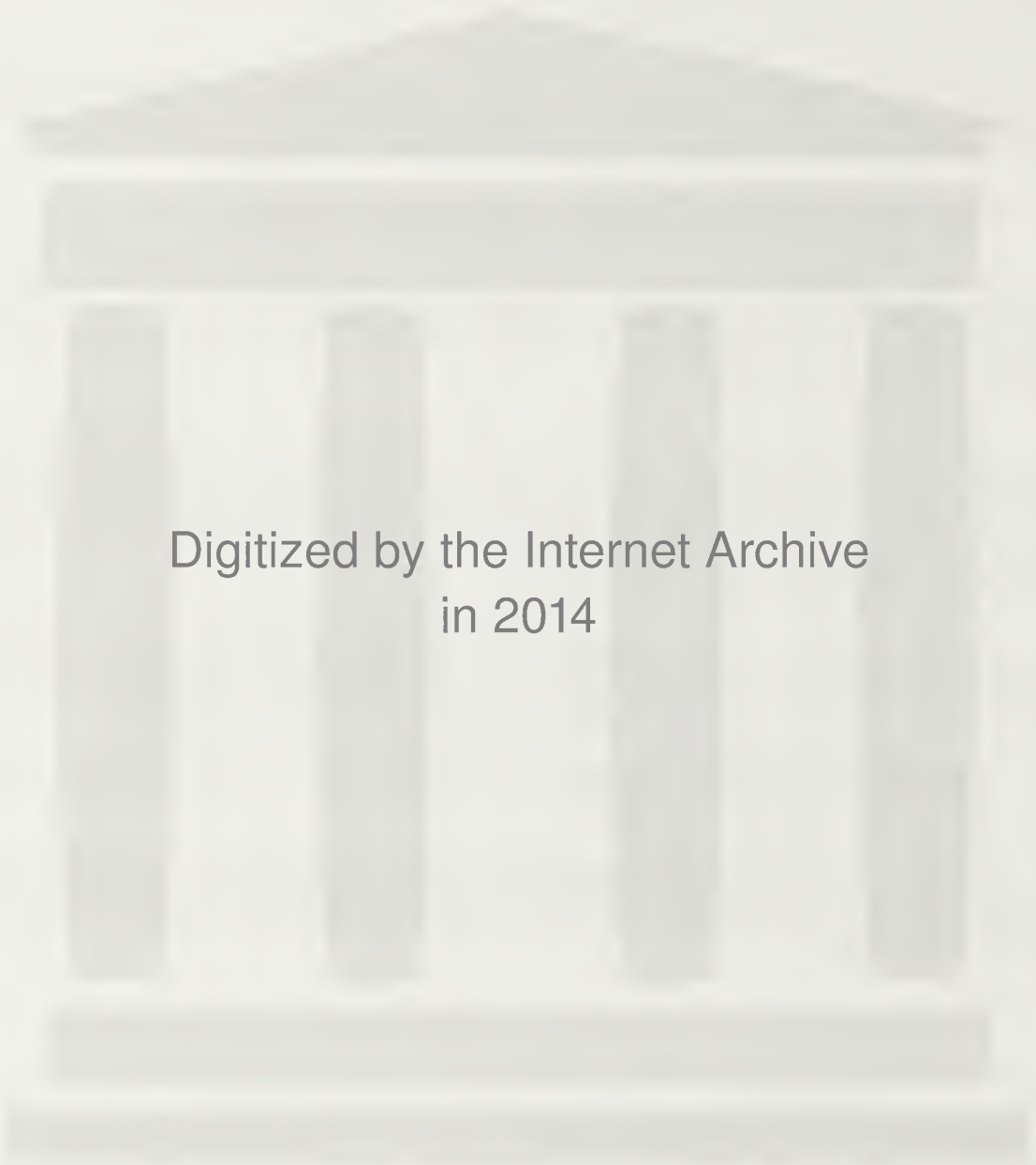
[2] We seek by this report to contribute our views on the immediate reforms proposed by two major recently released reports: the Massachusetts Bar Association/ Harbridge House and the Boston Bar Association. We note that longer-term but vitally important reforms are beyond the scope of this document. For example, the process of siting courthouses and furbishing courthouses is haphazard and uneven, and the entire process governing the physical plants from which we deliver justice urgently needs longer term scrutiny. These and other longer term issues may receive our attention in the future, and deserve on going public attention.



WHAT SHOULD HAPPEN?

- Put a clear management team in charge, give that team broad control over staff and adequate budget, and hold that team accountable.

"Management" judges (this term can variously include chief judges of each court department, presiding judges of each courthouse, regional administrative judges, etc.) should have and use when appropriate clear management power. This must specifically include: having and using when appropriate the power to discipline judges for failure to follow established rules or procedures, or failure to observe appropriate conduct; elimination of the few vestigial elected positions that are outside of the control of the judiciary (clerks and registers); and elimination of control by authorities outside the judiciary over court officers, probation officers, and clerical staff. The end result must be that all judges and all courthouse support employees (clerks, registers, court officers, probation officers, and clerical staff) are under the single authority of the judicial manager(s). We must correct the welter of conflicting lines of authority among clerks/registers, court officers, probation officers, etc. --without this, good management will be impossible. Judges must be given "management" responsibility and then they must be <u>able</u> to run a quality court operation; they cannot do so if the other judges and the support employees within the courthouse are independent from their management and answer to other authorities. It must be clarified (through legislation if necessary) that the management judges have supervisory authority over all judicial, clerical, and other staff within the courthouse; and all lines of authority should be clarified to so reflect. Merit, and not seniority, should be used to select all management judges within the court system. Further, management judges should serve at the pleasure of the next highest level of management (similar to most management structures) so that a true management team or pyramid exists. Lastly, once the legislature establishes an adequate budgetary amount for the judiciary, the control over details of expenditure should rest with the judicial managers, and should not be accomplished (as it is at present) by line item budgeting imposed by the Legislature.

- **Implement flexible assignment of judges and non-judicial support staff.**

  There must be clear power given to judicial managers, and willingness on their part to exercise the power, to move judges and non-judicial support staff (court officers, probation officers, clerical employees) from one courthouse to another, so that courthouses are not understaffed or overstaffed, nor overworked or underworked.

- **Implement specific improvements in efficiency as set forth below.**

  Performance evaluations for judges and for non-judicial support staff would be a valuable tool for improvement, and would serve the interests of judges, support staff, and the public. Such evaluations should be constructive, must be confidential, and must not intrude upon the decision making independence of the judiciary. Judicial education and education for the judiciary's support staff are vital, and the roles of the Flaschner Judicial Institute and/or the Judicial Institute of the Trial Court should be not only maintained but strengthened. In addition, the court system needs to increase its level of automation and data control by moving from paper systems to computerized systems. In addition, the "cult of the continuance" is still a problem in some courts and needs to be brought under better control. Alternative dispute resolution (ADR) can be a valuable tool to diminish caseload and backlog, and more creative and widespread use of ADR by the court should be implemented and encouraged. Lastly, session teams within a courtroom, accountable to the presiding judge of the courthouse, would be a valuable concept to implement, and an essential feature of such a successful model is the assignment of judges to courthouses for a minimum of six months.

Chapter Two

DEFINING THE CRISIS

We, as judges, offer these thoughts on the nature of the present "crisis" facing the courts in which we serve. We believe our perspective is unique and valuable. It is based on daily involvement in the court system.

Any reasonable model of the administration of justice has the expectation that the judge is ultimately responsible for the delivery of justice. Most judges feel and accept that responsibility in their daily work. However, our perspective should not be mis-perceived as "narrowly" judicial. Prior to becoming judges, each of us was a practicing attorney, and from our prior experience on the other side of the bench, we understand the perspectives of lawyers using the courts, of litigants and of the public at large. No judge arrived in the job sterilized; rather, all judges arrived in the job with substantial exposure to the problems of the courts and with a non-judicial perspective on those problems.

In many crucial respects the challenges of management in the court system are most similar to those of a university, and less similar to those which face a business corporation. Unlike a business corporation, the court system has no "profit" by which to measure success; because the court system's end "product" is not sold. The end product is "justice;" and "justice", like "education", has many facets and individual qualities. We are pleased and proud to note that the Boston Bar Association and Harbridge House reports conclude that, while the process of delivering "justice" in the Massachusetts courts is in need of much more efficiency, the end product of "justice" in the Massachusetts court system is second to none. **We endorse, then, a reform approach which will <u>not</u> compromise the present high quality of justice in our courts, but <u>will</u> improve the efficiency of its delivery.** The central challenge will be to apply the beneficial features of traditional business management principles without undermining professional discretionary and truly independent judicial decision making. (A concrete example might be helpful here: it is good management to have a system which ensures that all judges report to work on time or directs judges to an assigned courthouse or requires that judges conduct themselves with courtesy; it would undermine the independence of the judiciary if the management system were to tell a judge how to make a judicial decision.) As The Boston Bar Association and Harbridge House correctly conclude, **the time has come to acknowledge the need for enhanced management practices in the court** system, consistent with maintaining the independence that is essential to judicial decision making. Thus, we endorse the Harbridge House and Boston Bar recommendation that clear, ultimate authority be given to judicial managers to impose essential controls, implement improvements, and curb abuses within each courthouse and court department. **We agree with the Boston Bar Association and Harbridge House that the ultimate authority for judicial administration and management resides in the Supreme Judicial Court, and we believe that a clear "pyramidal" authority structure does not now, but needs to, exist in the courts. This will require a combination of definition of authority, and wise but firm exercise of authority by a pyramid of judicial managers,** ultimately accountable to the Supreme Judicial Court.

The fundamental management problem we perceive as judges is that the existing structure is not pyramidal. As both the MBA and BBA studies correctly point out, the authority of the Supreme Judicial Court (whether "inherent" or plainly spelled out) is not used often enough, is not used firmly enough, is sometimes unclear, and is occasionally doubted and even challenged. Furthermore, lines of authority between the Supreme Judicial Court and working judges in the trial courtrooms suffer the exact same weaknesses. Lastly, lines of authority for courthouse staff (e.g. court officers, probation officers, and clerks) supposed to support the judges do not in fact lead to judges, but instead to some other authority(ies) outside of the judiciary. This undermines any hope of creating an effective and efficient and accountable organization.

Chapter Three

AN ADMINISTRATIVE BOARD

The Harbridge House study proposes to establish an Administrative Board ("the Board") to serve the reconstituted Trial Court the way a Board of Directors serves a corporation. The Board's responsibilities would include:

1. review and approval of the Trial Court's budget;

2. review and approval of courthouse construction and closing;

3. review and approval of the hiring and job tenure of the Court Administrator;

4. review and approval of changes in judicial districts and "venue;"

5. setting policy and standards for trial court performance;

6. establishing the trial court's "public outreach" objectives.

The Board would have other duties, of an advisory or evaluative nature, which do not raise any serious questions. The functions listed above, however, seem to us not calculated to foster an efficient, accountable, independent judiciary.

We welcome a board of non-judges to offer frank comment, management and public relations expertise, and, if the situation warrants, brutally candid criticism of any aspect of the Trial Court's work. A useful model, we suggest, is the "Visiting Committee" used with great success by many universities, colleges, and other academic institutions. The "Visiting Committee" concept is simple and effective: a group of knowledgeable outsiders, following an independent agenda, makes detailed, on-site inquiry into the operation of the institution and produces a straightforward report emphasizing needed improvements. We would welcome such review. We would further welcome a completely independent committee, one where (a) none of the appointing power for membership lies with the judiciary, and (b) the membership includes no active judges. **In short, we vigorously endorse and support the concept of an independent outside observer for the Trial Court.** The perspective of an experienced judge could be provided by a retired Massachusetts judge or judges from other jurisdictions. Persons who are familiar with national perspectives on judicial administration would be good candidates for this board. It would be expected that such a board would take the views of the working judiciary into account in addressing problems and in making recommendations.

The Harbridge House report, however, suggests something rather different. The Board it envisions would exert management control over the Trial Court's daily operations. We believe it is unlikely that the Board as suggested passes constitutional

muster, because it violates separation of powers, a cornerstone of our Constitution. Even more important, we believe the Board as suggested is unwise.

In conclusion, we welcome the advice and insights and wisdom that an advisory cadre of non-judges could provide. We firmly believe, however, that control over court operations must remain within the judiciary itself. **We therefore strongly oppose a Board in the form Harbridge House proposes, but endorse an advisory board as we have described.**

Chapter Four

COURT REORGANIZATION

Both the Boston Bar Association and Harbridge House have addressed the question of the best organizational structure for the courts and have made valuable and innovative suggestions. We agree that the present administrative structure of the courts is too complex and diffuse and that the mechanisms for judicial accountability are unclear. **We endorse the various recommendations that ultimate responsibility for oversight and management must be lodged in the Supreme Judicial Court,** and that responsibility for day to day management of the court system must be implemented by units closer to the actual operation of the courts involved. We also agree that the Trial Court must be streamlined for management, administration and accountability purposes into fewer operating units.

We endorse something close to the court reorganization suggested by the Boston Bar Association's report[3], which rejects a totally unified trial court in the sense of elimination of all separate courts. The Harbridge House report's suggestion of a "transitional" 2-tier court is unwise, and we oppose it. A judge is many times selected to sit in a particular court because of the special background or experience or aptitude of the judge to fulfill the needs of the court to which he or she is appointed. Nevertheless, many individual judges are quite capable of and interested in handling cases outside of the jurisdiction of the court to which they were appointed, and there are occasions when workloads of judges in a given court may get out of balance, either on a short term or long term basis. In many instances **it makes sense to have and to use flexibility so that judges are able to handle cases outside of the court to which they were appointed.**

Non judicial personnel (court officers, probation officers, clerks, etc.) must also be able to be assigned where they are most needed, to increase the efficiency of the courts and avoid wasted time.

For example the following could be accomplished:

- the assignment of a Probate Court judge (in a part of the Commonwealth where the District, Probate, and Superior courts are all close together), whose trial settles at 11:00 A.M., across the street to a District Court to hear motions for the remainder of the day, to ease the workload in that court;

- a six month assignment of a District court judge to a Superior Court session to ease a backlog in the Superior Court;

- the transfer of a court officer from a Superior court session in which one judge

[3] At least one member of the subcommittee approves court reorganization only as part of longer term but equally necessary changes (such as control within the judicial branch over court house construction and the allocation of all other resources. Other ingredients in such a plan would take account of whatever additional steps are necessary to attract and keep the very best possible people as judges and other court personnel, and to insure that all trial judges have a say in on-going plans for improving our judicial system).

has two court officers, to a Probate Court session in which one judge has no court officers;

- the designation of a District Court judge in a rural part of the Commonwealth (where the county Probate Court is far away) as having simultaneous Probate Court authority for all purposes, so that when a 209A case comes before that judge, he/she can enter visitation orders and even grant a simple divorce, if appropriate.

We endorse the strengthened use of authority for flexible assignment of judges and non-judicial support personnel to promote efficient and streamlined delivery of justice.

Chapter Five

DE NOVO

We strongly support the elimination of trial de novo.[4]

At this time, however, debate over the de novo issue has become so divisive that it threatens to drain attention and energy away from the broader topic of system-wide court reform. We do not want the debate over elimination of trials de novo to diminish valuable energy which needs to be harnessed to address overall court reform, as discussed elsewhere in this Report. Given the concern that de novo as a single issue might harmfully detract energy and attention away from the more fundamental issues of court reform, it has been suggested that de novo reform be accomplished in a different process, not linked to the court reforms which are currently under debate. **To put it simply, while we think elimination of trial de novo now is an excellent idea, we would accept deferral of the de novo issue for later consideration**[5] **if it is going to bog down the overall exciting court reform momentum that is underway.**

We hope, and believe, that trial de novo will soon be eliminated by action of the bar, judiciary, and legislature; however let us not wait for that day while we undertake the court reforms we urge in this report.

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[4] The public debate on this issue has focused on criminal and juvenile cases. The remand and de novo system for civil cases deserves similar scrutiny, and while we take no position on it at this time, we encourage further attention and debate.

[5] Some members of this subcommittee have expressed reservations about this compromise and want to stress to readers that elimination of de novo is a critical component of meaningful court reform.